CH Choo & Sons Sdn Bhd v Wong Nyuk Shing @ Wong Teck Tsin

HIGH COURT (KUANTAN) — CIVIL SUIT NO 22–5 OF 2002
VT SINGHAM J
9 MARCH 2010

Civil Procedure — Pleadings — Introducing facts not pleaded during trial — No application to amend statement of claim — Whether allowed

Civil Procedure — Statement of agreed facts — Departed from — Neither withdrawn nor amended before or during trial — Whether plaintiff bound — Whether plaintiff estopped from denying or disputing

Company and Corporations — Separate legal entity — Whether company separate from members and management

Contract — Sale and purchase of land — Immovable property — Claiming share of profits derived from sale of land — Land registered in defendant's name — Privity — Whether plaintiff contributed towards purchase — Whether established — Whether entitled to share profits obtained through sale

Land Law — Sale and purchase — Immovable property — Transfer document — Form 14A — Joint venture company — Whether plaintiff allowed to introduce evidence to contradict, vary or add to or subtract from transfer document — Whether evidence adduced to show parties bound by transfer document — Evidence Act 1950 ss 91 & 92

Trusts and Trustees — Land — Creation of trust — Whether constructive or resulting trust — Entire purchase price paid by defendant — Land transferred and registered in defendant's name as registered owner — Whether any unconscienable conduct on part of defendant — Whether defendant bona fide acquirer

The plaintiff's claim against the defendant was for the sum of RM1,092,370.44 being 30% share of the profits derived from the sale of a piece of land in Mukim Triang, Temerloh. The defendant however, denied

the plaintiff's claim. The defendant contended, inter alia, that the agreement between the defendant and the plaintiff was that they will have to contribute equally to the purchase of the said land at RM1,099,687.50. At the request of the plaintiff, NS Wong Holding Sdn Bhd had advanced the deposit sum being RM109,968.75 on the agreement or assurance from the plaintiff to refund their share being RM55,021.50 before the completion date. The balance of the purchase price being RM989,718.75 had to be paid by the plaintiff and NS Wong Holding Sdn Bhd equally towards the capital of the said joint venture company. On or before the completion date of the sale and purchase agreement, the plaintiff had failed to pay the balance of their share towards the purchase price being RM494,859.38. The joint venture company in which the plaintiff and NS Wong Holding Sdn Bhd were the shareholders had subsequently agreed to sell the said land to the defendant at cost price without any further consideration with the condition that defendant had to settle the full balance purchase price. The joint venture company subsequently had allowed the said land to be transferred and registered in the defendant's name. Both the plaintiff and PW1 never at any time contributed towards the purchase price of the said land. Therefore, the plaintiff was not entitled to any share of the profits which was obtained through the sale of the said land by the defendant to Padurusan Sdn Bhd. The issues before this court are as follows: (a) whether the plaintiff had established their case based on the pleadings; (b) whether the plaintiff or PW1 who was not a party to this suit, were entitled to compensation under s 71 of the Contracts Act 1950; and (c) whether there was a constructive trust or resulting trust in favour of PW1 who was not a party to this suit or in favour of the plaintiff which was not pleaded or even testified by PW1.

Held, dismissing the plaintiff's claim with costs:

(1) The plaintiff had failed, on the balance of probabilities, to establish their claim against the defendant. Based on the evidence, in particular, PW1's evidence, it appeared that the contractual relationship, if any, as alleged, was between PW1 and the defendant and not the plaintiff. However, the plaintiff's claim as pleaded in the statement of claim was based on the alleged oral agreement between the plaintiff, a Sdn Bhd, and the defendant. PW1's evidence was certainly against the entire set of the plaintiff's pleadings. In other words, there was no privity of contract between the plaintiff and the defendant. Accordingly, the plaintiff had no legal right to sue on the alleged oral contract (see paras 5–7).

(2) Further, the transfer document, Form 14A, did not state that the defendant/transferee was the nominee nor was there any sufficient evidence produced to state the defendant was the nominee of the joint venture company. Based on the totality of the evidence, the defendant

had not orally promised PW1 or the plaintiff or that the plaintiff had ever agreed to the transfer of the said land to the defendant as nominee (see paras 8 & 10).

(3) There was no sufficient evidence produced by the plaintiff to show that the parties will not be bound by the transfer document and that the parties had intended to be bound only by the alleged oral agreement which supposedly was entered into between PW1 and the defendant and not the plaintiff as testified by PW1 (see para 9).

(4) There was no evidence to support a constructive trust or a resulting trust as raised for the first time in the course of submission and neither was it pleaded or raised as an issue to be determined by this court as agreed between the parties. There was no unconscionable conduct on the part of the defendant when the said land was transferred to the defendant and registered in his name as the registered owner absolutely. Admittedly, the entire purchase price was paid by the defendant. Indeed, the defendant was a bona fide acquirer. In any event, all these issues of a constructive trust or resulting trust seemed to have surfaced only during the submission. The court found that the cumulative circumstances did not show any intention to create a trust (see para 17).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah untuk RM1,092,370.44 yang merupakan 30% daripada bahagian keuntungan yang diperoleh daripada jualan sebidang tanah di Mukim Triang, Temerloh. Defendan walau bagaimanapun, telah menafikan tuntutan plaintif. Defendan menegaskan, antara lain, bahawa perjanjian antara defendan dan plaintif adalah bahawa mereka perlu menyumbangkan secara sama rata terhadap pembelian tanah tersebut pada harga RM1,099,687.50. Atas permintaan plaintif, NS Wong Holding Sdn Bhd telah membayar dahulu jumlah deposit sebanyak RM109,968.75 dengan persetujuan atau jaminan daripada plaintif untuk memulangkan bahagian mereka sebanyak RM55,021.50 sebelum tarikh siap. Baki harga belian sejumlah RM989,718.75 perlu dibayar oleh plaintif dan NS Wong Holding Sdn Bhd secara sama rata terhadap modal syarikat usaha sama tersebut. Pada atau sebelum tarikh siap perjanjian jual beli, plaintif telah gagal untuk membayar baki bahagian mereka terhadap harga belian sejumlah RM494,859.38. Syarikat usaha sama yang mana plaintif dan NS Wong Holding Sdn Bhd adalah pemegang-pemegang saham telah bersetuju untuk menjual tanah tersebut kepada defendan pada harga kos tanpa apa-apa balasan dengan syarat bahawa defendan perlu menyelesaikan baki penuh harga belian. Syarikat usaha sama selepas itu telah membenarkan tanah tersebut dipindah milik dan didaftarkan atas nama defendan. Kedua-dua plaintif dan PW1 tidak pernah pada bila-bila masa menyumbang kepada harga belian tanah tersebut. Oleh itu, plaintif tidak berhak terhadap apa-apa bahagian keuntungan yang diperoleh melalui jualan tanah tersebut oleh

defendan kepada Padurusan Sdn Bhd. Isu-isu di hadapan mahkamah ini adalah seperti berikut: (a) sama ada plaintif telah membuktikan kes mereka berdasarkan pliding; (b) sama ada plaintif atau PW1 yang bukan merupakan pihak kepada guaman ini, berhak mendapat pampasan di bawah s 71 Akta Kontrak 1950; dan (c) sama ada terdapat amanah konstruktif atau amanah berbangkit menyebelahi PW1 yang bukan pihak kepada guaman ini atau menyebelahi plaintif yang tidak diplid atau diberi keterangan oleh PW1.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Plaintif telah gagal, atas imbangan kebarangkalian, untuk membuktikan tuntutan mereka terhadap defendan. Berdasarkan keterangan itu, khususnya, keterangan PW1, ia kelihatan bahawa hubungan kontraktual, jika ada, sepertimana dikatakan, adalah antara PW1 dan defendan dan bukan plaintif. Walau bagaimanapun, tuntutan plaintif sepertimana dikemukakan dalam penyataan tuntutan adalah berdasarkan perjanjian lisan yang dikatakan antara plaintif, secara sendirian berhad, dan defendan. Keterangan PW1 semestinya adalah terhadap keseluruhan set pliding plaintif. Dalam erti kata lain, tiada priviti kontrak antara plaintif dan defendan. Sewajarnya, plaintif tiada hak sah untuk menyaman atas kontrak lisan yang dikatakan itu (lihat perenggan 5–7).

(2) Selanjutnya, pindah milik dokumen, Borang 14A, tidak menyatakan bahawa defendan/penerima pindahan merupakan penama mahupun terdapat apa-apa keterangan yang mencukupi dikemukakan bagi menyatakan defendan adalah calon syarikat usaha sama. Berdasarkan keseluruhan keterangan, defendan tidak berjanji secara lisan kepada PW1 atau plaintif atau bahawa plaintif telah bersetuju untuk memindah milik tanah tersebut kepada defendan sebagai penama (lihat perenggan 8 & 10).

(3) Tiada keterangan mencukupi dikemukakan oleh plaintif untuk menunjukkan bahawa pihak-pihak tidak akan terikat dengan dokumen pindah milik itu dan bahawa pihak-pihak berniat untuk hanya terikat dengan perjanjian lisan yang dikatakan telah dimasuki antara PW1 dan defendan dan bukan plaintif seperti yang diterangkan oleh PW1 (lihat perenggan 9).

(4) Tiada keterangan untuk menyokong amanah konstruktif atau amanah berbangkit seperti yang ditimbulkan untuk kali pertama semasa penghujahan dan ia juga tidak dirayu atau dibangkitkan sebagai satu isu untuk ditentukan oleh mahkamah ini seperti yang dipersetujui antara pihak-pihak. Tiada tindakan yang tidak berpatutan di pihak defendan apabila tanah tersebut dipindah milik kepada defendan dan didaftarkan atas namanya sebagai pemilik berdaftar secara mutlak. Adalah diakui, harga belian keseluruhannya telah dibayar oleh defendan.

Sememangnya, defendan merupakan pemeroleh secara bona fide. Dalam apa-apa keadaan, kesemua isu tentang amanah konstruktif atau amanah berbangkit dilihat telah timbul hanya semasa penghujahan. Mahkamah mendapati bahawa keadaan kumulatif itu tidak menunjukkan apa-apa niat untuk membentuk amanah (lihat perenggan 17).]

Notes

For cases on creation of trust, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2362–2363.

For cases on pleadings in general, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5186–5821.

For cases on sale and purchase in general, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4023–4028.

For cases on sale and purchase of land in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4900–5059.

For cases on separate legal entity in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 739–783.

Cases referred to

Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid [1996] 4 MLJ 623, HC (folld)

Aron Salomon (Pauper) v A Salomon & Co Ltd [1897] AC 22, HL (folld)

Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615, HC (folld)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (folld)

Blay v Pollard and Morris [1930] 1 KB 628 (folld)

EON Bank Bhd v Hotel Flamingo and another case [2005] 1 MLJ 712, HC (folld)

Eushun Properties Sdn Bhd & Ors v MBF Finance Bhd [1992] 2 MLJ 137, SC (refd)

Farrel v Secretary of State for Defence [1980] 1 All ER 166, HL (folld)

GL Baker Ltd v Medway Building and Supplies Ltd [1958] 1 WLR 1216, CA (folld)

Haji Mohamed Dom v Sakiman [1956] MLJ 45, CA (folld)

Haron v Macaulay [1969] 1 MLJ 169, FC (folld)

How Paik Too v Mohideen [1968] 1 MLJ 51, FC (folld)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196, HC (folld)

Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139, FC (folld)

Kandasami v Mohamed Mustafa [1983] 2 MLJ 85, PC (refd)

Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd [1984] 1 MLJ 243, FC (refd)

Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170, PC (refd)

A *King v Corke* (1875) 1 Ch D 57 (folld)
Law Kam Loy & Anor v Boltex Sdn Bhd & Ors [2005] MLJU 225; [2005] 3 CLJ 355, CA (refd)
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428; [1991] 1 CLJ 667, SC (folld)
B *Malaysia Building Society Bhd v Modern Crest Sdn Bhd & Ors* [2007] 2 MLJ 169, HC (folld)
Ming Holdings (M) Sdn Bhd v Yusof Latif Holdings (M) Sdn Bhd [2006] 4 MLJ 189; [2006] 3 CLJ 72, CA (folld)
Natesan v Goh Gok Hoon [1968] 2 MLJ 3, FC (refd)
C *Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR 221, CA (refd)
Palaniappan v Universiti Pertanian Malaysia [1995] 1 MLJ 353, HC (refd)
Saadian bte Karim v Ong Ting Chai [1996] 5 MLJ 646, HC (refd)
Siow Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118, PC (refd)
D *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465, FC (folld)
Tildesley v Harper 10 Ch 396 (folld)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (folld)

Legislation referred to

E Contracts Act 1950 s 71
Evidence Act 1950 ss 58, 91, 92, 92(b), 101, 103
Rules of the High Court 1980

Mura Raju (Mura Raju & Co) for the plaintiff.
Ong Siew Wan (Andrew David & Wong) for the defendant.

F

VT Singham J:

G **[1]** The plaintiffs' claim against the defendant as per statement of claim dated 29 December 2001 is, for the sum of *RM1,260,093.70m* being 30% share of the profits derived from the sale of land held under CT 4574 Lot 842, Mukim Triang, Daerah Temerloh ('the said land'). However, through several amendments made during the course of the trial the plaintiffs' claim stands at RM1,092,370.44m.

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[2] The defendant has denied the plaintiffs' claim. By the statement of defence, the defendant has pleaded that amongst others, the agreement between the plaintiffs and NS Wong Holding Sdn Bhd was that:

I (a)

(i) a company known as Syarikat Pembangunan Pesertaan Setia Sdn Bhd will buy the said land at the price of RM1,099,687.50m;

(ii) the plaintiffs and NS Wong Holding Sdn Bhd will have to respectively contribute equally as additional capital towards the

said company to pay for the purchase at RM1,099,687.50. At the request of the plaintiffs, NS Wong Holding Sdn Bhd had advanced the deposit sum being RM109,968.75 on the agreement or assurance from the plaintiffs to refund their share being RM55,021.50 before the completion date;

(iii) the balance of the purchase price being RM989,718.75 have to be paid by the plaintiffs and NS Wong Holding Sdn Bhd equally towards the capital of the said joint venture company;

(iv) on or before the completion date of the sale and purchase agreement, the plaintiffs had failed, refused or neglected and/or could not afford to pay the balance of their share towards the purchase price being RM494,859.38;

(v) the joint venture company in which the plaintiffs and NS Wong Holding Sdn Bhd, were the shareholders had subsequently agreed to sell the said land to the defendant at the cost price without any further consideration with the condition that defendant has to settle the full balance purchase price;

(vi) the joint venture company subsequently had allowed the said land to be transferred and registered in the defendant's name.

(b) both the plaintiffs and Choo Chiah Hua (now PW1) never at any time contributed towards the purchase price of the said land;

(c) the said land was transferred to the defendant based on the agreement as stated in paras (e) and (f) above;

(d) the plaintiffs are not entitled to any share of the profits which was obtained through the sale of the said land by the defendant to Padurusan Sdn Bhd;

(e) the plaintiffs' claim is weak, baseless and that the plaintiff has no cause of action against the defendant; and

(f) the plaintiffs' claim should be dismissed with costs.

[3] The plaintiffs' only witness is PW1. The defendant is DW1 and his witness is one Dato' David Wong ('DW2'), a lawyer.

[4] Based on the pleadings, the evidence both oral and documentary produced by both parties and the submission which has raised several matters, the decision of this court will be based on:

(1) The issues to be tried as agreed by both parties (IUB) (encl 39).

(i) Sama ada hartanah dikenali sebagai CT 4574 Lot 842 Mukim Triang, daerah Temerloh telah dijual oleh Syarikat Pembangunan Pesertaan

Setia Sdn Bhd kepada Defendan pada dan atas terma-terma dan syarat-syarat sama sebagaimana terkandung di dalam Surat Perjanjian Jual Beli bertarikh 12 September 1991 yang dimasuki di antara Syarikat Pembangunan Pesertaan Setia Sdn Bhd dan Tan Guat Phiak dan Ong Wee Tock @ Ong Poey Chan; dan/atau

(ii) Sama ada pindahmilik hartanah tersebut kepada Defendan adalah dengan syarat bahawa sekiranya Defendan kemudian akan jual hartanah atau memajukan hartanah tersebut, defendan seharusnya membayar Plaintif amaun senilai dengan 30% daripada keuntungan hasil jualan dan/atau hasil kemajuan hartanah tersebut.

(iii) Keuntungan diperolehi daripada jualan hartanah tersebut, sekiranya disesuaikan.

(2) The statement of agreed facts as agreed by both parties (FDP) (encl 39).

(i) Pada semua masa material Syarikat NS Wong Holdings Sdn Bhd tersebut dan plaintif berkongsi sama rata dalam sebuah syarikat yang berdaftar Syarikat Pembangunan Pesertaan Setia Sdn Bhd.

(ii) Pada semua masa material syarikat Pembangunan Pesertaan Setia Sdn Bhd telah memasuki perjanjian bagi membeli hartanah di bawah keterangan hakmilik CT 4574 Lot 842 Mukim Triang, daerah Temerloh ('hartanah tersebut') dengan harga belian RM1,099,687.50 yang mana dipersetujui akan ditanggung sama rata oleh Plaintif dan syarikat NS Wong Holdings Sdn Bhd tersebut.

(iii) Walau bagaimanapun, atas permintaan Plaintif, Syarikat NS Wong Holdings Sdn Bhd telah mula-mula membayar wang deposit 10% ke atas pembelian tersebut berjumlah RM109,968.75 dan kemudiannya baki harga belian dan deposit 10% akan disumbang oleh Plaintif dan NS Wong Holdings Sdn bhd pada atau ketika 'Completion Date'.

(iv) Pada atau sebelum penyempurnaan Perjanjian Jual Beli, plaintif tidak mampu untuk membayar bahagiannya baki harta belian yang berjumlah RM494,859.38.

(v) Syarikat Pembangunan Pesertaan Setia Sdn Bhd di mana Plaintif dan NS Wong Holding Sdn Bhd adalah pemegang saham kemudiannya telah bersetuju untuk menjual hartanah tersebut kepada Defendan dengan harga kos.

(vi) Syarikat Pembangunan Persertaan Setia Sdn Bhd kemudiannya telah membenarkan hartanah tersebut dipindahkan dan didaftarkan di atas nama Defendan.

(3) Whether the plaintiffs have established their case based on the pleadings.

(4) Whether the plaintiffs' or PW1 who is not a party to this suit, is entitled to compensation under s 71 of the Contracts Act 1950.

(5) Whether there was a contructive trust or resulting trust in favour of the PW1 who is not a party to this suit or in favour of the plaintiffs which was not pleaded or even testified by PW1.

[5] Having heard and seen the witnesses and having considered the evidence with the various documents produced by both parties and upon considering the submission with the authorities, the decision of this court is that, the plaintiffs have on the balance of probabilities failed to establish their claim against the defendant. It would appear that the alleged oral contract if any, was between PW1 and the defendant and has nothing to do with the plaintiffs as pleaded.

[6] This court is mindful that it is a well established principle that the object of the court is to decide the rights of the parties and not to punish them for mistakes or omission they make in the conduct of their case as courts do not exist for the sake of discipline but for the sake of deciding matters in controversy which is placed before the court. However, it must be made clear that it is not the function of this court to correct the pleadings or the pleaded case of the parties as that is a matter for the party concerned to make the necessary application to amend or place the correct or relevant materials before the court (see *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216 at p 1231; *King v Corke* (1875) 1 Ch D 57; *Tildesley v Harper* 10 Ch 396 at p 397; *Palaniappan v Universiti Pertanian Malaysia* [1995] 1 MLJ 353 at pp 360–370).

In *Blay v Pollard and Morris* [1930] 1 KB 628, Scrutton LJ said at p 634:

> cases must be decided on the issues on the record; and if it is desired to raise other issues there must be placed on the record by amendment.

In the event, and based on the evidence, in particular, PW1's evidence, it would appear that the contractual relationship, if any, as alleged, was between PW1 and the defendant and not the plaintiffs. However, the plaintiffs' claim as pleaded in the statement of claim is based on the alleged oral agreement between the plaintiffs', a *Sdn Bhd* and the defendant. PW1's evidence is certainly against the entire set of the plaintiffs' pleadings. It is settled law that parties are bound by the pleadings and if there was a need to amend the pleadings, the plaintiffs ought to have applied for such amendment to the statement of claim. The plaintiffs are therefore not entitled in law to depart from their pleaded case (see *Haji Mohamed Dom v Sakiman* [1956] MLJ 45; *How Paik Too v Mohideen* [1968] 1 MLJ 51 at p 52; *Natesan v Goh Gok Hoon* [1968] 2 MLJ 3 at p 8; *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615 at p 620; *Farrel v Secretary of State for Defence* [1980] 1 All ER 166 at p 173; *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ 667 at pp 432, 434 (MLJ); pp 671, 673 (CLJ); *Abdul Rahman bin Abdul Karim v Abdul Wahab*

bin Abdul Hamid [1996] 4 MLJ 623; *Saadian bte Karim v Ong Ting Chai* [1996] 5 MLJ 646 at p 647; *Ming Holdings (M) Sdn Bhd v Yusof Latif Holdings (M) Sdn Bhd* [2006] 4 MLJ 189 at p 195; [2006] 3 CLJ 72 at p 78; *Malaysia Building Society Bhd v Modern Crest Sdn Bhd & Ors* [2007] 2 MLJ 169). In other words, based on PW1's evidence, it would appear there was no privity of contract between the plaintiffs and the defendant. This court cannot include or imply a term into the alleged contract which was supposedly between PW1 and the defendant to be that of, between the plaintiffs and the defendant where the law is clear and settled that PW1 and the plaintiffs are separate legal entity which is one of the fundamental principles of company law. The law treats a company as being a separate person from its members and those who manage its operation and this is described as the doctorine of separate legal personality (see *Aron Salomon (Pauper) v A Salomon & Co Ltd* [1897] AC 22 at p 30; *Law Kam Loy & Anor v Boltex Sdn Bhd & Ors* [2005] MLJU 225; [2005] 3 CLJ 355 at p 362; *Ming Holdings (M) Sdn Bhd v Yusof Latif Hodings (M) Sdn Bhd* [2006] 4 MLJ 189 at p 194; [2006] 3 CLJ 72 at p 77).

[7] Accordingly, the plaintiffs have no legal right to sue on the alleged oral contract. On this ground alone, the plaintiffs' claim must fail (see *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170; *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 at p 431) (see also s 101, s 103 of the Evidence Act 1950; *EON Bank Bhd v Hotel Flamingo and another case* [2005] 1 MLJ 712).

[8] The transfer document Form 14A (P8 A-D) did not state that the defendant/transferee is the nominee nor is there any sufficient evidence produced to state the defendant is the nominee of the joint venture company. Accordingly, PW1 cannot, *first*, introduce evidence, to contradict, vary or add to or subtract from its terms as contained in the transfer Form 14A (P8 A-D) as this would contravene s 91 and s 92 of the Evidence Act 1950 and *secondly*, to convert, vary or depart from the plaintiffs' pleadings by oral or documentary evidence to be that of a claim by PW1 unless the pleadings have been amended pursuant to proper application and having obtained an order of court. In any event, where the evidence is partly oral and partly documentary, the documentary evidence is to be preferred as to the oral, especially where the evidence is, at variance. However, each case is based on its own set of facts and the 'best evidence rule' would prevail.

[9] This court is mindful that a separate oral collateral contract may in certain cases be proved as provided under s 92(b) of the Evidence Act 1950 provided it is not inconsistent with the terms reduced in writing as required by law and it comes within the exception or illustrations contained in s 92 and this will depend on the surrounding circumstances (see *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 at p 233; *Eushun Properties Sdn Bhd & Ors v MBF Finance Bhd* [1992] 2 MLJ 137 at pp 142–143; *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243; *Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR 221 at p 227). In the instant case, there is no sufficient evidence produced by the plaintiffs to show that the parties will not be bound by the transfer document (P8 A-D) and that the parties had intended to be bound only by the alleged oral agreement which supposedly was entered into between PW1 and the defendant and not the plaintiffs as testified by PW1 (see *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85).

[10] Having considered the conduct of the parties both before and after the transfer of the said land to the defendant as per Form 14A (P8 A-D) and having taken into consideration the surrounding circumstances, the totality of the evidence, in particular, DW2's evidence, this court finds that the defendant had not orally promised PW1 or the plaintiffs or that the plaintiffs had ever agreed to the transfer of the said land to the defendant as nominee. There is no reason advanced why this fact was not disclosed to DW2 or of the alleged promise by the defendant of the payment of 30% of the profits of the sale of the said land to PW1. In addition according to DW2 both PW1 and the defendant had instructed him to prepare the circular resolution dated 18 September 1991 (P3 A-B) which was signed by both PW1 and the defendant and this was not denied by PW1. Therefore, the circular resolution (P3 A-B) which was signed by both, PW1 and the defendant contradicts PW1's oral evidence that the said land was transferred to the defendant as nominee and this is a material contradiction which goes to the root or the basis of PW1's alleged claim which this court finds is also against the plaintiffs' pleaded case. There is also no mention of any other terms in P4.

[11] There is no mention of this alleged claim of the plaintiffs in the letter dated 27 August 1997 from PW1 to the defendant (exh P34). Further, PW1's evidence is totally against the *fakta-fakta yang dipersetujui* dated 25 May 2006 (FDP) (encl 39) signed by both the solicitors for the plaintiff and the defendant. This *fakta-fakta yang dipersetujui* (FDP) was neither withdrawn or amended before the trial commenced or even during the course of the trial and still remains as agreed facts which is part of the plaintiffs' case. The statement of agreed facts are clear and unambigous. The plaintiffs are bound by the admission as contained in the statement of agreed facts which was signed by both the solicitors and the case should have been approached on the

basis of those admitted facts. Accordingly, the plaintiffs' are estopped from denying or disputing the statement of agreed facts (see s 58 of the Evidence Act 1950 and *Haron v Macaulay* [1969] 1 MLJ 169). There was also an agreement between the parties as to the issues which was required to be tried by this court as stated in the *Isu-Isu Untuk Dibicarakan* (encl 40). On the facts, this court wishes to answer question 1, 'Sama ada hartanah dikenali sebagai CT 4574 Lot 842 Mukim Triang, Daerah Temerloh telah dijual oleh Syarikat Pembangunan Persertaan Setia Sdn Bhd kepada defendan pada dan atas terma-terma dan syarat-syarat sama sebagaimana terkandung di dalam Surat Perjanjian Jual Beli bertarikh 12 September 1991 yang dimasuki di antara Syarikat Pembangunan Persertaan Setia Sdn Bhd dan Tan Guat Phiak dan Ong Wee Tock @ Ong Poey Chan' in the positive and question 2, 'Sama ada pindah milik hartanah tersebut kepada defendan adalah dengan syarat bahawa sekiranya defendan kemudian akan jual hartanah atau memajukan hartanah tersebut, defendan seharusnya membayar plaintif amaun senilai dengan 30% daripada keuntungan hasil jualan dan/atau hasil kemajuan hartanah tersebut' in the negative as per the issues to be tried. PW1's evidence not only contradicts and is inconsistent with the statement of agreed facts as provided under s 58 of the Evidence Act 1950 but is a complete departure of the plaintiffs' pleadings which obviously shows that the plaintiffs have no regard to the pleadings filed in court (see *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196).

[12] The court is of the considered view that the plaintiffs cannot recile or depart from the statement of agreed facts which the parties had agreed to be bound to determine the dispute between them. This court finds that there was a valid agreement on the terms reached between the parties on the mode and manner of determining the issues in the trial and none of the terms of the agreement as contained in the statement of agreed facts was contrary to or in breach of any law or the Rules of the High Court 1980 or any other rules and the statement of agreed facts is accepted by the court. If the parties had chosen and agreed as to the manner of resolving the dispute between them, they will have to bare whatever is the outcome (see *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465 at pp 474–476).

[13] Based on the letter dated 8 October 1998 (exh P13) from PW1 to the defendant and the letter dated 16 June 2001 (exh P16) from PW1's solicitors to the defendant, it is clear from those two letters that the claim could only be maintained by PW1 and not the plaintiffs and it is still subject to proof. Accordingly, as raised by para 9 of the statement of defence, plaintiffs have no cause of action against the defendant. In any event, this court is mindful that the decision of this court is not limited to just the two set of documents namely, the statement of agreed facts and the statement of claim or the two letters P3 and P16 but assessment of the totality of the evidence. Therefore,

this court is in agreement with the submission of learned counsel for the defendant that on this ground alone the plaintiffs' claim must fail. A

[14] This court is unable to appreciate why should there be a duty imposed on the defendant to draw the attention of PW1 to those parts of the statement of claim or the statement of agreed facts which have been contradicted by PW1 as the defendant has no obligation to assist the plaintiffs to improve their pleaded case or to point out the weaknesses in the plaintiffs' case during cross-examination. A prudent lawyer will certainly reserve the same for submission as was rightfully done by learned counsel for the defendant. B C

[15] The burden of proof is an obligation on the part of the plaintiff to adduce sufficient evidence of a fact in issue. In other words, the burden of proof in the sense of establishing a case as pleaded, rests on the party, who asserts the affirmative of the case. In the instant case, the burden of proof is on the plaintiffs to establish the case as pleaded. Unfortunately, this court finds the plaintiffs have not by preponderance of evidence established their claim. Based on the evidence, it is crystal clear the plaintiffs have departed from the pleaded case and the statement of agreed facts which still remains unexplained by PW1 except by way of submission that the inconsistency is because PW1 had three roles in the whole transaction which is certainly unacceptable. If the plaintiffs have intended to place any facts which were not pleaded before the court for the court to decide on the truth of those facts, it is the duty of the plaintiffs and they were at liberty to apply to the court for the necessary amendments be it in the statement of claim or even to the statement of agreed facts or issues to be tried. It is regrettable that the plaintiffs had failed to apply to the court for any such amendment and the plaintiffs are bound by their pleaded case and must be prepared to accept the fate of this judgment if this court did not decide in their favour. D E F G

[16] As for the alternative claim under s 71 of the Contracts Act 1950, which was raised for the first time by way of submission by learned counsel for the plaintiff, this court is once again in agreement with the submission of learned counsel for the defendant that this is a claim which is based as an after thought and with respect, a desperate and last minute attempt to depart from the plaintiffs original claim which they must be aware was bound to fail. As submitted by learned counsel for the defendant, this court finds that this alleged claim was not only not pleaded but PW1 himself had not in his evidence claimed for this alleged compensation. Accordingly, this court, being a court of justice and the trial is conducted on the basis of adversarial system, this court cannot and will not make out a claim for the plaintiffs or grant relief of a claim which the plaintiffs themselves have not pleaded or PW1 himself has not claimed through his evidence or by proper legal H I

procedures. At this stage, it is appropriate to state the entire evidence of PW1 is inconsistent, contradictory and a complete departure of the plaintiffs' pleaded case, the documentary evidence and the admission by the statement of agreed facts.

In *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118:

> It is to be noted that the Privy Council, had reversed the decision of the Federal Court and restored the judgment of the High Court. For the sake of completion, it is to be noted that in that case, learned counsel for the plaintiffs had in his opening speech of the plaintiffs' claim, had given notice although it was not pleaded that the plaintiffs had an alternative claim under s 71 of the Contracts Act 1950 for the work done on the road and had also said that it was not intended to be done gratuitiously. However, the Privy Council was of the considered view that the four conditions as laid down in s 71 had not been satisfied to establish the said claim. Accordingly, the Privy Council found that there was no such agreement although the trial judge did not decide on that issue. In that case, the trial judge did not consider the question of whether the plaintiffs were entitled to compensation under s 71 although the same was raised during the opening speech and later during submission but of course the claim was not pleaded.

In the circumstances, the claim for compensation under s 71 presently made by way of submission cannot be entertained in law or on the facts and it is disallowed. The plaintiffs have not established the four conditions as laid down in s 71. It is obvious that the facts in the instant case are not the same as those in that case relied on by learned counsel for the plaintiffs.

[17] On the facts, this court is satisfied that there is no evidence to support the submission of learned counsel for the plaintiff of a constructive trust or a resulting trust as raised for the first time in the course of submission and neither was it pleaded or raised as an issue to be determined by this court as agreed between the parties as contained in IUB. This court also finds there was no unconscionable conduct on the part of the defendant when the said land was transferred to the defendant and registered in his name as registered owner absolutely. Admittedly, the entire purchase price, being RM1,099,687.50m was paid by the defendant. Indeed, the defendant was a bona fide acquirer. In any event, all these issues of a constructive trust or resulting trust seemed to have surfaced only during the submission which is, *first*, it is against the weight of the evidence, *secondly*, it is not the pleaded case of the plaintiffs, *thirdly*, the defendant has been denied the opportunity to cross-examine PW1 on this alleged claim of a constructive trust or resulting trust and *fourthly*, the defendant is gravely prejudiced by this alleged claims which obviously is an afterthought where the defendant had been denied the opportunity to put his case to the plaintiffs and rebut all this alleged claims. The plaintiffs have now set out a case of an alleged resulting trust which is not

only not founded upon, but contrary to the plaintiff's own pleadings. This court finds that the cumulative circumstances did not show any intention to create a trust.

[18] The submission by learned counsel for the plaintiffs that the defendant himself has no document to show 'it was definitely otherwise would point to the fact that there was such an arrangement' is with respect misplaced. *First*, there is no duty imposed on the defendant to assist the plaintiffs to improve their claim, *secondly*, even if the plaintiffs have established their claim as pleaded which is not the case, the defendant has in fact produced sufficient evidence both oral and documentary to rebut the plaintiffs' claim. *Thirdly*, it is not the correct proposition on the facts, with respect, to submit that the defendant himself has no document to show 'it was definitely otherwise', *fourthly*, the defendant has in fact produced sufficient documentary evidence to show the true situation of the transaction as to the purchase of the said land which included documents produced on behalf of the plaintiffs which have been tendered and marked as the plaintiffs' exhibits coupled with the evidence of DW2 who has no interest in the outcome of this case. Therefore, it would appear that the plaintiffs as a last attempt to salvage the plaintiffs' weak claim seemed to have introduced by way of submission other reliefs for which no evidence was produced or even pleaded and where the plaintiffs' claim as pleaded is bound to fail.

[19] Be that as it may, even assuming that the plaintiffs had produced sufficient evidence to support their claim which is not the case, and where this court is not satisfied, this court finds that the defendant had sufficiently rebutted the plaintiffs' case. In fact, this court finds that the defendant's version of what transpired between PW1 and the defendant is inherently more probable when considering the totality of the facts with the documentary evidence. On the other hand, even if the defendant's evidence is not probable or acceptable or the evidence of both on behalf of the plaintiffs and the defendant are equally not probable, the onus is still on the plaintiffs to establish its pleaded case which they had failed. Until and unless the plaintiffs have discharged the onus of proof which is placed on them, on the balance of probabilities, the burden did not shift to the defendant. In the instant case, this court finds the plaintiffs have failed to discharge the onus of proof which was placed on them against the defendant (see *Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139 at p 142). As stated above, this court finds that the plaintiffs have failed to establish their claim against the defendant on the balance of probabilities.

[20] In accordance with the reasons and justice, the plaintiffs' claim against the defendant is dismissed with costs.

Plaintiffs' claim dismissed with costs.

Reported by Ashgar Ali Ali Mohamed